

2001 DRAFTING REQUEST**Bill**

Received: 04/18/2001

Received By: **kunkemd**Wanted: As **time permits**

Identical to LRB:

For: **Rodney Moen (608) 266-8546**By/Representing: **Lee Cullen**This file may be shown to any legislator: **NO**Drafter: **kunkemd**May Contact: **Lee Cullen**

Addl. Drafters:

Subject: **Public Util. - electric**

Extra Copies:

Submit via email: **NO**

Requester's email:

Pre Topic:

No specific pre topic given

Topic:

Leased generation facilities

Instructions:


See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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/2	kunkemd 04/30/2001	gilfokm 04/30/2001	martykr 04/30/2001	_____	lrb_docadmin 04/30/2001		State
/3			pgreensl 04/30/2001	_____	lrb_docadmin 04/30/2001	lrb_docadmin	State 04/30/2001

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Page 1

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(608) 251-0101
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April 4, 2001

CONFIDENTIAL

BY HAND

Mr. Bruce Humphrey
Office of Senator Rod Moen
Room 8 South - State Capitol
Madison, WI 53707

Dear Bruce,

As discussed, enclosed are the proposed statutory changes.

Sincerely,

CULLEN WESTON PINES & BACH LLP



Lee Cullen

LC/st

cc: Mark Kunkel, LRB

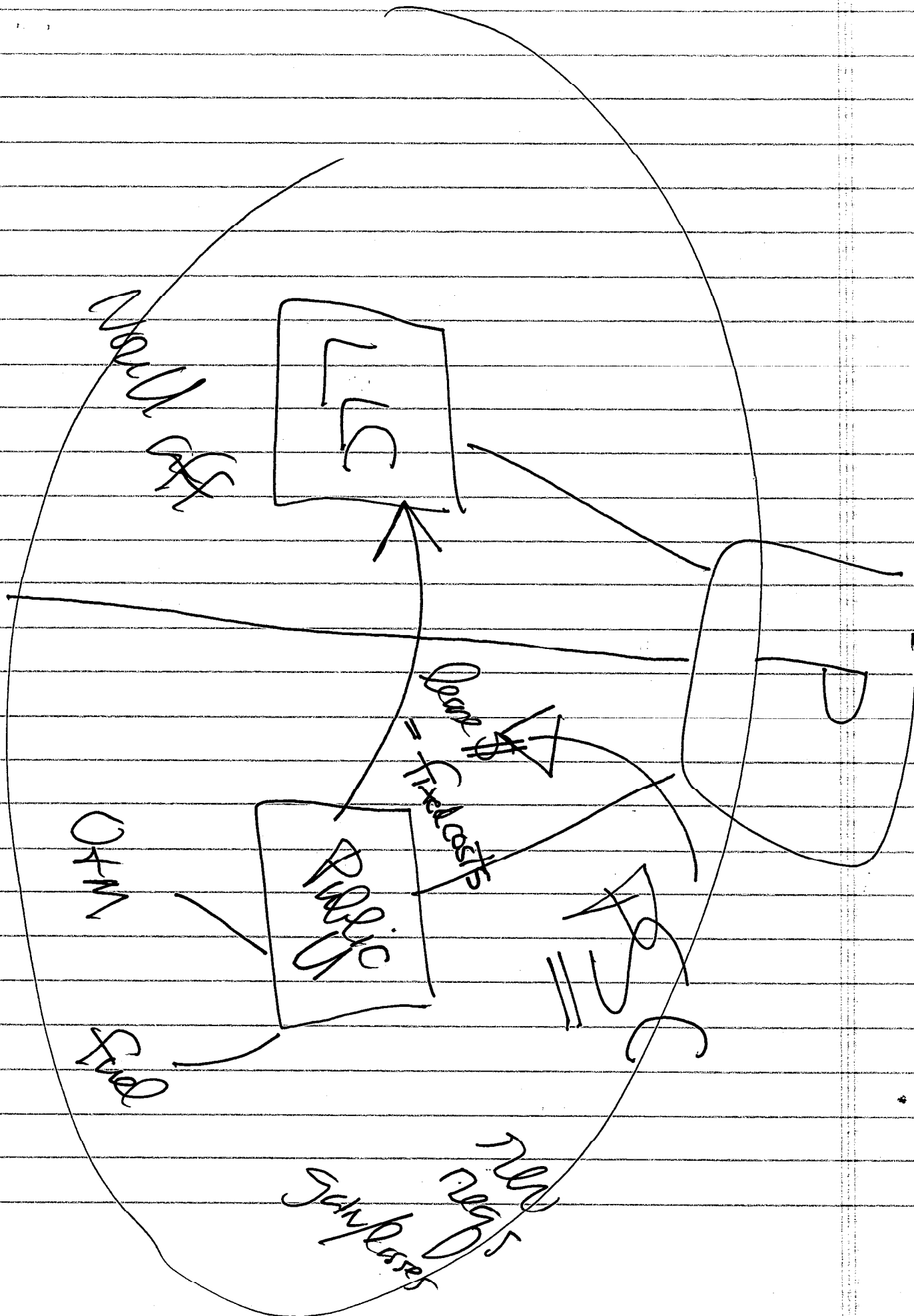
Enclosure

FILE COPY

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Alison TenBruggencate
Gordon E. McQuillen
Carol Grob
Linda L. Harfst

Curt F. Pawlisch
Elise Clancy Ruoho
Mary Wright
Jordan Loeb
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Shana R. Lewis
Nicholas E. Fairweather

Of Counsel:
Cheryl Rosen Weston



Proposed Statutory Changes

- 1) Add to sec. 196.795(5)(k)(2):

flip-flop logic { In this section and in sec. 196_____ "new leased generation facility" shall mean a new generation facility that is leased to the public utility affiliate by an affiliated lessor pursuant to a long-term lease approved by the commission having a term of not less than twenty years, in the case of a gas-fired facility, and not less than twenty-five years, in the case of a coal-fired facility, and which has received a certificate under sec. 196.491(3), Stats after 1/01/01. Upon approval of the commission, a public utility affiliate may transfer land and buildings (excluding existing generation facilities) on a site to a nonutility affiliate in order to construct on that site a new leased generation facility.

- 2) Create new sec. 196._____ *196.52 ?*

rev. reqs. { Except for any payments by a public utility pursuant to a lease of a new leased-generation facility, the commission may not increase or decrease the retail revenue requirements of a public utility as a result of any dividend, distribution, or charge received by such public utility, or by a company in a holding company system in which the public utility is an affiliate, as a result of a new leased generating facility.

capital events { The commission may not increase or decrease the retail revenue requirements of a public utility as a result of any gain, profit, or loss arising from the ownership of a new leased generation facility by an affiliated entity. The commission shall allow a public utility which leases a new leased generation facility to recover fully in its retail rates the approved payments under the lease, and all other prudently incurred costs incurred in operating and maintaining such facilities.

operating expenses {

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April 17, 2001

BY HAND

Attorney Mark Kunkel
Legislative Reference Bureau
100 North Hamilton Street, 5th Floor
Madison, WI 53703

Dear Attorney Kunkel:

Enclosed, as requested, is a copy of WEC's Petition for a Declaratory Ruling in PSCW Docket No. 6630-DR-104, together with CFC's letter of support and comments. The drafting instructions you previously received by letter dated April 4 are consistent with the generation compromise described in these documents.

Please feel free to contact me if you have any questions regarding this matter.

Sincerely,

CULLEN WESTON PINES & BACH LLP



Lee Cullen

LC/st

cc: Bruce Humphrey

Enclosures

- 3119

Lee Cullen
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Nicholas E. Fairweather

Of Counsel:
Cheryl Rosen Weston

February 28, 2001

Ms. Lynda L. Dorr
Secretary to the Commission
Public Service Commission of Wisconsin
610 North Whitney Way
Madison, WI 53707

Re: Petition of Wisconsin Electric Power Company and
As Yet Unformed Generation Affiliate for Declaratory
Ruling Pursuant to Section 227.41, Wis. Stat., Regarding
Applicability of Certain Statutes and Public Service
Commission Orders to Proposed Plan to Increase
Available Generation in Wisconsin.
Docket No. 6630-DR-104

Customers First! Coalition
Petition for Relief Regarding Electric Reliability.
Docket No. 5-GF-111

Dear Ms. Dorr:

The Customers First! Coalition believes that Wisconsin Energy's Revised Filing in Docket No. 6630-DR-104 known as Power the Future-2 is consistent with its Generation Action Plan as filed with the PSCW in Docket No. 9300-DR-100, and provides a framework for moving forward to develop and review Power the Future-2 generation projects. CFC commends WEC for moving rapidly to amend its proposal in a manner which substantially reduces controversy and increases the prospects for resolving Wisconsin's electric-supply needs expeditiously.

CFC supports WEC's request that the PSCW grant preliminary approval of PTF-2 within 90 days.

CFC further supports preliminary approval of PTF-2, including the request for interim relief, permitting the generation projects to move forward expeditiously, provided that

Customers First! Coalition

February 28, 2001

Page 2

Cullen Weston Pines & Bach LLP

individual CFC members representing retail customers (including but not limited to CUB) and not CFC reserve their rights to address in any relevant proceeding the issue of the appropriate return on equity (ROE) embedded in the proposed lease transaction and the issue of rate impacts on customers (including the issue of the reasonableness of recovering specific precertification expenses in the event that the PTF-2 plants are not built), and provided further that CFC environmental-group members (including but not limited to WED and RENEW) reserve the right to address environmental issues in any relevant CPCN proceeding (including whether the PTF-2 projects meet the environmental standards of the CPCN statute), and other environmentally related aspects of PTF-2, including conservation and renewables.

Sincerely,

CULLEN WESTON PINES & BACH LLP



Lee Cullen

LC/st

cc: Customers First! Coalition
Wisconsin Electric Power Company
Wisconsin Public Service Corporation
Wisconsin Industrial Energy Group
Wisconsin Paper Council
Wisconsin Initiative Seeking Energy Reform, LLC

**BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN**

**Petition of Wisconsin Electric Power Company
and As Yet Unformed Generation Affiliate
for Declaratory Ruling Pursuant to
Section 227.41, Wis. Stat., Regarding
Applicability of Certain Statutes and Public
Service Commission Orders to Proposed Plan
to Increase Available Generation in Wisconsin**

Docket No. 6630-DR-104

**REQUEST FOR FULL PARTY STATUS AS AN INTERVENOR
AND STATEMENT OF POSITION BY THE
CUSTOMERS FIRST! COALITION**

Pursuant to Wis. Admin. Code PSC § 2.32, the Customers First! Coalition hereby requests full party status as an intervenor and states its position in the above-captioned matter.

I. STATEMENT OF INTEREST IN THE PROCEEDING.

Customers First! is a coalition of local governments, small businesses, farmers, environmental groups, labor and consumer groups, retirees and low-income families, 82 municipal electric utilities, 26 rural electric cooperatives, two wholesale suppliers and one investor-owned utility. Customers First! supports responsible reform in our state's electric industry which: 1) preserves Wisconsin's low electric rates and traditionally reliable service; 2) sustains Wisconsin jobs; and 3) promotes environmental responsibility.

Customers First! has a substantial interest in this proceeding. On behalf of its member organizations, it developed with representatives of Wisconsin Energy Corporation (WEC), the parent holding company of Wisconsin Electric Power Company (WEPCO), a proposed framework by which WEC's subsidiaries could be permitted to construct new electric generation facilities in this

state. That framework is embodied in Power the Future 2 (PTF-2) as described in WEPCO's petition. Moreover, certain members of Customers First! are and/or will be wholesale customers of WEPCO who will benefit from the additional supplies of lower-cost electricity which WEPCO will generate from the facilities it proposes to construct. Other members of Customers First! may become co-owners of the new generating facilities as described in WEPCO's petition. Those co-ownership arrangements would help these members meet their obligation to provide reliable electric service to their customers. Certain other members of Customers First! represent the interests of retail ratepayers. These ratepayers have a substantial interest in ensuring that they receive least-cost, reliable electric service. They also face direct rate impacts as a result of the construction associated with PTF-2. Finally, the environmental groups who are members of Customers First! have a substantial interest on behalf of their individual members to ensure that the construction and operation of PTF-2 facilities are consistent with sound environmental stewardship.

II. STATEMENT OF POSITION.

Last year, WEPCO filed its initial Power the Future plan (PTF-1). Customers First! objected to certain aspects of PTF-1, especially its jurisdictional impacts. Under PTF-1, WEPCO would have transferred all of its generating facilities to an unregulated WEC subsidiary (a GENCO). Moreover, regulatory authority over the pricing of energy sales from the proposed GENCO to WEPCO would have transferred to the Federal Energy Regulatory Commission.

WEC and WEPCO representatives discussed these concerns with Customers First! and accepted an alternative approach to financing the construction of new generating facilities. The result of those discussions has led directly to the PTF-2 petition presently before the Commission.

Customers First! submits that it is appropriate for the Commission, consistent with applicable law and procedure, to grant the specific declaratory relief sought by WEPCO. Additionally, CFC requests that the Commission give priority to, and expedite, this proceeding. As a backdrop to WEPCO's declaratory ruling request, on March 19 and 20, 2001, California ordered rolling blackouts throughout that state. The new regulatory framework proposed by WEPCO and agreed to by Customers First! can help Wisconsin avoid such a scenario. PTF-2 deserves this Commission's immediate review.

In a prior letter submitted in this docket, Customers First! has already indicated its general support of WEPCO's new regulatory framework. Customers First! writes separately to address the issues of WEPCO's pre-certification expenses and its earning a current return on construction work in progress (CWIP) with respect to PTF-2 generation facilities.

WEPCO seeks a Commission ruling that it is prudent for it to reimburse the WEC generation subsidiary identified in PTF-2 for the subsidiary's prudently incurred pre-certification expenses, that WEPCO may include such expenses in its lease payments to the generation subsidiary, and that it may recover these expenses in the event that it is prudent to terminate PTF-2. Customers First! submits that WEPCO's request to recover such prudently incurred pre-certification expenses is reasonable and appropriate.

With respect to construction work in progress, WEPCO has requested that the Commission find that it is reasonable for WEPCO to earn a current return on CWIP following issuance of a certificate of authority or a certificate of public convenience and necessity on PTF-2 generation facilities. Of course, WEPCO itself will not actually own the generation facilities under construction. Customers First! therefore construes WEPCO's request as asking that the Commission determine that it is reasonable for WEPCO to enter into an agreement with WEC's generation

subsidiary whereby WEPCO will make payments to the subsidiary equivalent to the CWIP return WEPCO would receive if it owned the facilities under construction. Baseload power plants require enormous capital investment with long lead times before those plants become operational. Given the magnitude of this investment, it is appropriate that WEPCO be permitted to recover in rates its payments to WEC's generation subsidiary in an amount equivalent to a current return on CWIP.

III. CONCLUSION.

For the aforementioned reasons, Customers First! should be granted full party intervenor status in the above-captioned proceeding, and the Commission should move expeditiously to grant the specific declaratory relief sought by WEPCO as identified in the Notice of Proceeding.

Dated this 25th day of March, 2001.

Respectfully submitted,

CUSTOMERS FIRST! COALITION

By: 

Lee Cullen
Attorney
Cullen Weston Pines & Bach LLP
122 W. Washington Avenue, Suite 900
Madison, WI 53703
Telephone: (608) 251-0101
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4430-DR-104

BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Petition of Wisconsin Electric Power
Company and As Yet Unformed Generation
Affiliate for Declaratory Ruling Pursuant to
Section 227.41, Wis. Stat., Regarding
Applicability of Certain Statutes and Public
Service Commission Orders to Proposed Plan
to Increase Available Generation in Wisconsin

Docket No. _____

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PUBLIC SERVICE COMMISSION

PETITION

Larry J. Martin
Brian D. Winters
Quarles & Brady LLP

Attorneys for
Wisconsin Electric Power Company and
As Yet Unformed Generation Affiliate

February 23, 2001

I. INTRODUCTION AND SUMMARY

On November 29, 2000, Wisconsin Energy Corporation filed an application with the Public Service Commission of Wisconsin regarding its Power the Future ("PTF") proposal. Wisconsin Energy hereby withdraws its original PTF proposal, without prejudice, except for those portions of PTF set forth in Appendix A of this petition. In its place, the petitioners offer a new proposal, "Power the Future- 2" ("PTF-2"), which changes the original proposal in a number of areas to meet objections raised and to simplify the plan. In order to proceed with PTF-2, petitioners seek a declaratory ruling as described herein.

The following is a summary of PTF-2 and this petition:

A. Under PTF-2, the proposed non-utility generation company will build and own, but not operate, new power plants and make major new investments in existing plants. This change preserves the opportunity for financing advantages compared to a traditional utility structure. However, under PTF-2 the new plants will no longer be merchant plants. Petitioners propose that a long-term asset lease approved by the PSCW, pursuant to § 196.52, Wis. Stat., rather than a Power Purchase Agreement regulated by the FERC, will operate to set the financial and other terms between the proposed generation company and its new investors on the one hand, and the utility and its investors and customers on the other. The long-term lease will set forth the specific terms that are necessary to remove uncertainty regarding the regulatory treatment of new plants, and to ensure construction in a timely fashion of the new generation that Wisconsin needs. The new plants will be operated by the utility using utility employees, and all costs of operation will be incurred by the utility subject to PSCW regulation.

B. PTF-2 addresses competitive issues that might arise and proposes specific mitigation measures.

C. PTF-2 eliminates that feature of Power the Future whereby existing plants would be transferred to a non-utility affiliate as merchant plants. As proposed in this filing, existing plants will remain within the utility. No transfer of employees or assets is required, and the regulatory status of these plants is unchanged.¹

D. PTF-2 clarifies that the utility is responsible for operating and controlling the new plants owned by the generation company, as well as for wholesale sales (including opportunity sales) from the new plants, and proposes appropriate treatment for opportunity sales.

E. PTF-2 establishes the utility's rights at the end of the term of the lease. The utility will have a right to extend the lease or acquire the plants outright, each at then-market value and subject to a prudence determination by the PSCW under then-existing regulation. (If necessary to avoid adverse tax consequences, the generation company will have the right to require a lease extension instead of a purchase.)

F. PTF-2 permits investment by mid-sized Wisconsin energy providers and power purchases by others. To accommodate the requirements of Wisconsin Electric's customers, PTF-2 will include an additional gas-fired facility to be operational in 2008, and will specifically identify a coal-fired facility targeted for operation after 2010 (i.e., 2011). The specific plant configurations and their locations will be determined in the CPCN process.

¹ Where existing plant assets must be transferred to facilitate new investment – i.e., land and buildings at Port Washington that will accommodate new construction – some existing plant assets may be transferred.

G. PTF-2 maintains an increased commitment to conservation and renewables.²

By this petition, Wisconsin Electric and its as yet unformed generation affiliate seek a declaratory ruling from the PSCW with respect to the proposed structure and framework of PTF-2. In subsequent proceedings the PSCW will determine whether the proposed plants and the associated asset lease meet the applicable public interest standards set forth in the construction permitting (CA and CPCN) statutes (sec. 196.49 and 196.491(3)) and applicable affiliated interest statutes.

It is essential that the PSCW expedite consideration of this petition, so that the state can address its projected capacity shortage in a timely fashion and avoid severe problems like those facing California. Any PSCW determination regarding this petition will be subject to the additional approvals necessary for the eventual operation of those proposed new facilities, including permits and approvals from the DNR.

Since the original Power the Future announcement in September, events in Wisconsin and nationally have underlined the urgency of Wisconsin moving aggressively to increase the supply of energy available and improve reliability of the energy infrastructure, thereby assuring adequate supplies at reasonable prices over the next two decades. Recent events (especially those in California) have also corroborated the soundness of a plan which involves a combination of new plants built by a utility affiliate and operated by the utility at existing sites with cost-based pricing under long-term arrangements, additional IPP merchant plants, fuel diversity, and increased reliance on conservation and renewable fuels.

² Wisconsin Electric looks forward to working with various interested parties concerning which specific commitments would be most beneficial in these areas.

II. PSCW ACTION REQUESTED

The persons to whom Petitioners seek to make this declaratory ruling apply are Wisconsin Electric Power Company, the non-utility generation affiliate referred to in this Petition, and the Public Service Commission of Wisconsin. The properties to which Petitioners seek to make this ruling apply are the new leased generation facilities and the major new capital improvements to existing non-nuclear generation facilities described in Section III of this Petition. The facts to which this ruling is sought to apply are the new regulatory mechanism for new leased generation facilities and major capital improvements to existing non-nuclear generation facilities described in Section III of this Petition.

The new regulatory mechanism proposed in this Petition involves the provisions of Chapter 196 and the administrative rules thereunder which pertain to PSCW regulatory treatment of new leased generation facilities and major capital improvements to existing non-nuclear generation facilities. PTF-2 proposes a new interpretation of these statutes and rules by the Commission. Petitioners request that the Commission interpret and apply these statutes and rules in accordance with the new regulatory mechanism set forth in Section III of this Petition.

It is essential to move forward with PTF-2 immediately in order to bring needed new generation on-line in a timely manner. Because it will take some time to prepare the detailed plans and agreements and to obtain PSCW approval of those plans and agreements, Petitioners seek at this time a declaratory ruling pursuant to section 227.41, Wis. Stat., which would include the following determinations:

- (a) It is prudent for Wisconsin Electric to proceed with the development of PTF-2, including the new regulatory mechanism described below in Section III whereby new generation will be constructed and owned by a non-utility affiliate and leased to Wisconsin Electric.
- (b) It is prudent for Wisconsin Electric to agree to reimburse the affiliated non-utility generation company for pre-certification expenses which the generation company prudently incurs in construction of new generation facilities under PTF-2, to separately account for such expenses, and to report periodically to the Commission regarding the level of such expenses and the schedule for further expenditures.
- (c) When the PTF-2 facilities are operational, it is reasonable for Wisconsin Electric to include such pre-certification expenses in the lease payments to the new generation affiliate.
- (d) In the event that it is prudent for the company to terminate PTF-2 due to a material change in the plan or the company's relevant circumstances, Wisconsin Electric may amortize over a period of time determined by the Commission and recover in rates pre-certification expenses paid to the affiliated non-utility generation company, to the extent the level of such pre-certification expenditures is reasonable.
- (e) Following issuance of a Certificate of Authority or a Certificate of Public Convenience and Necessity, it is reasonable for Wisconsin Electric to earn a current return on construction work in progress (CWIP) with respect to PTF-2 generation facilities.
- (f) All prudent expenditures by Wisconsin Electric in implementing PTF-2 fall within the reliability "carve-out" contained in the PSCW's order approving the merger of WICOR and Wisconsin Energy.
- (g) The mitigation actions proposed are appropriate in addressing competitive concerns.

In order for the proposed new capacity to come on line in a timely fashion to meet the reliability needs of Wisconsin customers, Petitioners must begin immediately to incur a variety of costs. Because of market conditions and other factors, these pre-certification costs are significantly higher than they have typically been in the past. In particular, a substantial

imbalance between the supply of and demand for turbines necessitates making large deposits with vendors to secure a place in the queue.

It is expected that under the proposed long-term asset lease all of the prudently incurred costs of bringing the new capacity online, including prudently incurred pre-certification expenses, will be included in the lease payments made by Wisconsin Electric to the new generation affiliate. Those costs would then be recovered in rates paid by Wisconsin Electric's customers, for whose benefit PTF-2 is being undertaken.

Because of the expected magnitude of the pre-certification expenses, Petitioners cannot proceed with PTF-2 absent some assurance that these expenses, to the extent the amount is prudent, can be recovered in rates. A request for recovery of prudent pre-certification expenses must be possible even if, at some later date, the decision is made not to pursue PTF-2. The Petitioners respectfully submit that this Petition raises only issues of law and policy and that a decision by the PSCW can be completed within 90 days from the date of this filing.³

III. STATEMENT OF FACTS AND DESCRIPTION OF PTF-2

Power the Future proposed that a non-utility generation subsidiary be created within Wisconsin Energy that would build, own, and operate new power plants and furnish power to Wisconsin Electric under a long term Power Purchase Agreement. Under PTF-2, the generation company will build and own, but not operate, the plants and the assets will be leased to the utility and used to meet the utility's ongoing obligation to provide utility service subject to PSCW

³ For example, financial issues of fact will be raised and determined in a later PSCW proceeding concerning the lease; environmental and competitive issues of fact will be raised and determined in a later CPCN proceeding.

jurisdiction.⁴ The new plants will not be wholesale merchant plants because they will be operated by the regulated utility, and the affiliated owner will not make sales of electricity to anyone during the term of the lease.

A. The Proposed Generation Company Will Build Low Cost Power Plants.

The proposed generation company will be a non-utility affiliate and single-purpose entity within Wisconsin Energy designed to finance, build, and own the new power plants. It will build generation facilities that are intended to be least-cost and which will provide power which will be priced using traditional cost methodologies.

Petitioners believe the new PTF-2 facilities represent the least-cost option⁵ for Wisconsin Electric's customers at this time for four reasons: (1) The proposed new facilities will use existing sites at cost; (2) materials and services will be competitively sourced; (3) pricing will be cost-based with the return on assets established up front by the PSCW through its review of the lease arrangements; and (4) the fuel diversity provided by the new plants will sharply reduce the volatility and price risk associated with dependence on a single fuel for all of the new generation capacity built in Wisconsin.

First, at Oak Creek and Port Washington, Wisconsin Electric owns two of the best sites for new power plants in the state. These are existing power plant sites with transmission infrastructure already in place, and with adequate supplies of cooling water available without jeopardizing groundwater resources. In addition, the Oak Creek site has existing rail facilities to

⁴ Because no assets would be transferred, and no construction is proposed now within the state of Michigan, there should be no approval required from the MPSC for PTF-2.

⁵ This determination would be made at the outset of the project by comparison with the likely prices resulting from gas combined-cycle plants at greenfield sites.

deliver coal, ash handling infrastructure, and coal plant operations and maintenance staff. The advantages of the Port Washington and Oak Creek sites significantly reduce the risk of permitting and construction delays, thereby reducing the risk of cost overruns and capacity shortfalls due to delays.

Second, the engineering services, construction services, and equipment for the new facilities will be competitively sourced to ensure the generation company receives the best value for its investment at the lowest evaluated life-cycle cost.

Third, under the terms of the lease, the customers of the utility are assured of having long-term access to capacity and energy from the new plants at cost-based prices.

Fourth, and finally, the customers of the utility are likely to see a significant savings as a result of the fuel diversity commitment in the PTF-2 proposal. It is very unlikely that an IPP would commit now to build three major coal-fired power plants in Wisconsin over the next 10 to 15 years, due to the higher capital costs and longer construction lead times compared to natural gas combined cycle power plants. Yet reliance on natural gas as the primary fuel source for new generation in the state will result in substantial electricity price increases to consumers, driven by the increasing gap between coal prices and natural gas prices. It is projected that the first two 600 MW coal plants in the PTF-2 proposal will save customers over \$1.6 billion over the term of the lease. Apart from projected financial savings, it is clearly prudent for reliability reasons for the state to diversify its fuel risks.

B. The Lease Will Establish Financial Terms.

A long-term net lease of the power plants from the generation company to the utility will facilitate new investment.

The lease will establish fixed-cost recovery for the new plants as approved up front by the PSCW in a manner on which investors can rely, thus improving the ability to attract capital on reasonable terms. The terms of the lease will address depreciation, capital structure, cost of debt, and return on equity, among other financial issues. Capital recovery will be coterminous with the term of the lease with the affiliate, and will be set on a plant-by-plant basis for the new facilities: 20 years for the gas-fired plant, and 25 years for each of the coal-fired units⁶. The capital structure used to set lease prices annually will be similar to the capital structure targeted by the PSCW for the utility's regulated generation plant in service. The capital structure proposed will be 58% equity and 42% debt, which is consistent with the PSCW's target of 55%-60% equity for utility capital structure. The cost of debt included in the lease payments during the term of the lease will be a proxy cost of debt established at the time construction financing is put in place for each plant. The rate of return on equity also will be fixed at the outset by the PSCW for the term of the lease based upon the type of new plant and the risks associated with such investment, but will not exceed 13.9%. Additional financial provisions will be set forth in the proposed lease.

Responsibility for other cost components will be specified in the lease in a manner typical for a transaction in which an owner-lessor builds a major, capital-intensive facility for the use of another party and then enters into a long-term net lease of the facility to that party. The lease payments will include reasonable costs of project development and construction such as

⁶ These are the same units described in PTF—one unit of approximately 500MW at the existing Port Washington location, three coal-fired units of approximately 600MW at Oak Creek or another location all by 2011. Due to increased demand, an additional gas-fired unit is proposed for 2008 at an as-yet undetermined location. The sizes are approximate and depend upon technologies and efficiency. At this time, it appears that units larger than 600MW may be necessary to meet demand, but final decisions will not be made until the CPCN process, assuming PTF-2 goes forward. Also, as in the PTF, the fuel types and plant locations stated here are Wisconsin Energy's preliminary preferences, but are subject to regulatory review in light of alternatives.

engineering, legal, finance, and accounting services, as approved by the PSCW. The lessee-utility will be responsible for the costs of operating and maintaining the plant. During the term of the lease, when the utility has full control of the plants and all the benefits of operation flow to the utility, the utility will be responsible for the costs of environmental compliance and taxes. The utility also will be responsible for the costs of additional conservation and renewables measures proposed in Power the Future-2, subject to Commission approval.

The lease will also address responsibility for capital improvements (renewals and replacements) during the term of the lease and opportunity sales.

PSCW review and approval of this structure and lease terms at the outset will provide assurance to customers of stable, cost-based prices over the term of the lease and to investors of capital-cost recovery for the same period.

C. Corporate Structure of the Generation Company.

The generation company will be organized as a limited liability company or other entity that is not a public utility under the Federal Power Act. Due to tax considerations and the need to meet the requirements of Wisconsin Electric's own utility customers, Wisconsin Energy will own at least 80% of the generation company. Up to 20% of the generation company or of one or more of the plants themselves will be owned by other Wisconsin utilities and cooperatives as described below.

D. This New Proposal Addresses Anti-Competitive Effects.

Under PTF-2 the new generation company will build and own approximately 2,500 MW of new capacity, and Wisconsin Electric will purchase from unaffiliated wholesale merchant plants about 1,000 MW of new capacity. Petitioners project that, because of continuing load

growth and likely plant retirements, Eastern Wisconsin will need at least 4,000 MW of new capacity in the next ten years and more thereafter. Other available projections, including the PSCW's recently released Strategic Energy Assessment, project similar capacity needs. As a consequence, the share of EWU capacity owned and/or controlled by affiliates of Wisconsin Energy will remain approximately the same as it currently is, as calculated by the PSCW's recent market power study (Docket No. 05-E1-120). Moreover, under PTF-2 all of Wisconsin Electric's share of the capacity of the PTF-2 plants will be committed through the proposed lease for a term of 20 or 25 years to Wisconsin Electric's retail and long-term firm wholesale customers under cost-based rates.

Further mitigation measures reduce the likelihood of anticompetitive effects:

First, mid-sized Wisconsin power suppliers with total load of 500MW-1500MW that would have considerable difficulty building a 600 MW plant on their own and that do not have a long-term firm supply relationship with Wisconsin Electric will participate in the PTF-2 plants. Participation will be in the form of an option for an equity ownership stake in the generation affiliate, or a joint ownership of one or more of the new plants, depending on the supplier's particular circumstances. Minority owners will couple their ownership with a corresponding share in the output from the new plants. Due to tax considerations and Wisconsin Electric's own needs, not more than 20% of the generation company will be owned by others.⁷

Second, Wisconsin Public Power, Inc. (WPPI) is Wisconsin Electric's largest firm wholesale customer and a majority of WPPI's member municipal load is located within

⁷ This is a general description and is not intended to supercede or modify the specific terms governing these arrangements which will be established by contract.

Wisconsin Electric's service territory. Wisconsin Electric has served a portion of this load for many years, directly or through WPPI. As a mitigation measure, Wisconsin Electric will agree to extend its existing firm power sales agreement with WPPI to provide WPPI with a secure, long-term source of power for a designated portion of its load. The amount of power available under the extension will be contingent upon the PTF-2 plants being built. The service under the extension will be priced at fully allocated average cost on a basis comparable to Wisconsin Electric's retail rates for native load service, so that there will be no cross subsidy issue.⁸ Wisconsin Electric will include this designated wholesale load in its planning as "wholesale native load."

Third, Badger Power Marketing Authority (BPMA), consisting of the cities of Shawano and Clintonville, is Wisconsin Electric's only other long-term wholesale requirements customer that has been paying fully allocated average cost rates for many years. As a mitigation measure related to this load, Wisconsin Electric will agree to continue to serve BPMA on an all-requirements basis at rates that are based on fully allocated average embedded cost comparable to Wisconsin Electric's retail rates for native load service and to treat this load as wholesale native load.

Fourth, for other municipal and cooperative wholesale customers with loads of 400 MW or less, as of 2001, Wisconsin Electric will offer, as a mitigation measure, long-term firm wholesale service of at least of 150 MW during open seasons established at the times CPCNs are issued for the PTF-2 plants. Wisconsin Electric may offer this capacity in stages as the PTF-2

⁸ Wholesale contracts described in PTF-2 are and will be subject to FERC jurisdiction.

plants are approved for construction (e.g., 50 MW from each coal unit). As in the case of WPPI and BPMA, the rates for this service will reflect fully allocated average embedded costs on a basis comparable to Wisconsin Electric's retail rates for similar service, and Wisconsin Electric will include this load in its planning as "wholesale native load." Service contracts will be offered for a minimum of five years and a maximum of the length of the term of the lease, and service contracts need not commence at the same time. In the event any open season is under-subscribed, the balance of the capacity will lapse to Wisconsin Electric. In the event any open season is over-subscribed, Wisconsin Electric will either offer pro rata contracts to those desiring purchases, or will offer one or more of those desiring purchases the option of being first in line for the next open season. Each of the market power mitigation measures described above is intended to treat Wisconsin Electric's Wisconsin retail and long-term firm wholesale loads on an equivalent and fair basis. Wholesale customers will agree to accept in their cost of service PTF-2 lease-payment costs at the levels approved by the PSCW for retail customers. (The FERC will need to approve the wholesale rates, and so there may be minor differences in cost recovery because of different ratemaking methodologies.)

Petitioners ask the Commission to find that these mitigation measures are reasonable and appropriate for Wisconsin wholesale customers, that the rate equivalency proposed for wholesale customers is fair, fully compensatory, will not harm retail customers, and is not a basis for adjusting Wisconsin Electric's retail revenue requirements downward.

E. Existing Plants Remain in the Utility.

To assist in financing and to achieve operational economies of scale at existing sites, PTF proposed moving existing non-nuclear generation assets to the generation affiliate. In PTF-2, the

financial requirement can be satisfied under the lease structure if appropriate financial terms are approved and the combined operation of the old and new plants is retained in the utility. PTF-2 also resolves other complexities, such as assignment of existing power supply contracts between the utility and the generation company. No merchant plants are proposed under PTF-2.

PTF-2 preserves PTF's advantage of building new facilities at existing plant sites. To avoid joint ownership of a single operating site by the generating company and Wisconsin Electric, Wisconsin Electric will seek authority to transfer some land and buildings to the generation company to be part of the new plants, provided that the land and buildings are leased back to the utility at cost on a long-term basis. This will include, for example, the land and building at Port Washington, which will be incorporated into the generation company's new plant at Port Washington. These transfers and leasebacks will be at book value.

In addition, the generating company will finance, build, and own major capital improvements to existing plants (except nuclear plants),⁹ under the same lease terms. These new investments (but not the embedded investment in existing facilities) will have the same financial terms as the new generation facilities.

In all other respects, existing utility assets remain with the utility, and jurisdiction over those assets remains exclusively with the PSCW to the same extent as exists today.

F. The Utility Controls and Dispatches the New Power Plants.

The lease agreement establishes a fixed-payment obligation on the part of the utility for the term of the lease, and new power plants will be operated by the utility for the benefit of utility

⁹ These are projects of sufficient magnitude that a CA or CPCN is required by the PSCW.

customers in a fully integrated utility business. The utility will control the operation of the plants including dispatch, maintenance, etc.

The utility will also be responsible for wholesale sales from the new plants. As set forth above, some of these sales will be in the form of long-term firm contracts with smaller power suppliers. With respect to opportunity sales, in order to encourage aggressive optimization of these new plants as well as existing plants, in the interest of customers and shareholders, petitioners propose that Wisconsin Energy shareholders be entitled to retain 25% of the profits from opportunity sales, provided that such sales do not adversely affect availability for Wisconsin Electric's firm customers.

G. The Utility Retains "End of Lease" Rights.

PTF was silent as to what will happen at the end of the proposed Power Purchase Agreement. Under PTF-2, the utility has the right to continue in control of each plant at the expiration of the lease for that plant. Exercise of that right, if the utility so chooses, will be at fair market value at the time. The terms under which the option may be exercised will be fixed in the lease. This provides investors the expectation of a market return after the term of the initial lease, but allows the utility the choice of retaining the plants for its customers or making other, more favorable arrangements for its customers. The choice made will be subject to a contemporaneous "prudence review" by the PSCW consistent with regulation in effect at the time.

The generation company will have the right to require that a lease extension be used instead of a purchase, if necessary to avoid adverse tax consequences. In addition, market value will be established by a disinterested third-party expert, rather than by either corporate entity or the PSCW. The PSCW will, however, retain the final check on the valuation process by

reviewing the utility's determination based on whatever price is established by the disinterested third-party.

H. The Proposed New Plants Will Be Required To Meet All Applicable Public Interest Standards Prior to Construction and Operation.

The determination sought by this Petition will resolve threshold issues and allow Petitioners to begin implementation of the PTF-2 in a timely fashion. However, the proposed new plants will still be subject to extensive regulatory scrutiny and will have to meet several different public interest standards before they are built and operated. In addition, the lease between the generation company and the utility will be an affiliated-interest transaction, and thus it will have to be demonstrated to the PSCW that the terms of the lease are reasonable and consistent with the public interest (see Section 196.52), and do not result in any unjust discrimination against, or have any anti-competitive effect upon, any competitors.

Furthermore, in the relevant CA or CPCN proceedings, the PSCW also will need to find that the projects meet specific statutory standards. These include the following:

- that the benefits of the projects are greater than their costs;
- that the projects satisfy the reasonable needs of the public for an adequate supply of electricity;
- that the design and location of the projects is in the public interest considering alternatives;
- that the projects do not have undue adverse environmental impacts; and
- that the ownership, control, and operation of the projects does not have a material adverse effect on the relevant wholesale electricity market.

(See, generally, Sections 196.49 and 196.491, Wis. Stats.)

Dated this 23rd day of
February, 2001.

R. D. Winter

STATE OF WISCONSIN)
)
 MILWAUKEE COUNTY)

R. D. Venter

Signed and sworn to before me
on February 23 2001
by Brian D. Winters

Sally J. Plauske
Notary Public
State of Wisconsin
My Commission expires 2/15/04

Cullen Weston Pines & Bach

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FACSIMILE TRANSMISSION

CONFIDENTIAL

DATE: April 18, 2001

TO: Mark Kunkel

FAX NO.: (608) 264-6948

FROM: Lee Cullen

RE: Attached

Pages Including Cover Page: 3

Comments: As you requested.

Please Report Fax Transmission Problems To: (608) 251-0101.

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WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

TO: REPRESENTATIVE TIMOTHY HOVEN
FROM: John Stolzenberg, Staff Scientist *JS*
RE: Legal Impediments to the Wisconsin Energy Corporation's Power the Future-2 Proposal
DATE: March 19, 2001

This memorandum was prepared in response to your request for identification of statutory changes which will be necessary for the Wisconsin Electric Power Company to implement its Power the Future-2 (PTF-2) proposal. This proposal is set forth in the petition of Wisconsin Electric and an as yet unformed generation affiliate for a declaratory ruling by the Public Service Commission (PSC) under s. 227.41, Stats., regarding the "Applicability of Certain Statutes and Public Service Commission Orders to Proposed Plan to Increase Available Generation in Wisconsin," dated February 23, 2001.

This memorandum focuses upon statutes that may or do pose a direct legal impediment to the proposal. Other statutory changes, which either Wisconsin Electric or other proponents of the proposal may advocate as being desirable for other reasons, such as to improve the economics of the proposal, are not addressed in this memorandum.

The list of statutes presented below should be viewed as an initial list of actual or potential impediments to the proposal based on the information in the petition. It is not possible to make a complete list at this time because parts of the proposal have not been completely specified. For example, the petition states that "PTF-2" maintains "an increased commitment to conservation and renewables" and goes on to provide that "Wisconsin Electric looks forward to working with various interested parties concerning which specific commitments would be most beneficial in these areas." [Petition, op. cit., item G and footnote 2, page 3.] Until commitments such as these are specified in greater detail, it is not possible to assess whether any statute will have to be modified for the commitment to be implemented.

The following statutes conflict with, or may conflict with, elements of the proposal, based on the description of the proposal in the petition:

1. **Transfer of real property.** The petition indicates that Wisconsin Electric will seek authority to transfer some land and buildings to the generation company to be part of the new power

-2-

plants to be constructed under the proposal and that these transfers and leasebacks will be at book value. [Petition, op. cit. III E., par. 2, pages 14 and 15.] These transfers conflict with the following requirement in the public utility holding company law which requires that transfers of real property, in general, be by public sale or to the highest qualified bidder:

... no public utility affiliate may transfer, sell or lease to any nonutility affiliate with which it is in a holding company system any real property which, on or after November 20, 1985, is held or used for provision of utility service except by public sale or offering to the highest qualified bidder. [s. 196.795 (5) (2) Stats.]

The petition also indicates that the generating company will "finance, build and own major capital improvements to existing plants (except nuclear plants), under the same lease terms. These new investments (but not the embedded investment in existing facilities) will have the same financial terms as the new generation facilities." [Petition, op. cit., III E., par. 3, page 15.] To the extent that these improvements will entail the transfer of real property from Wisconsin Electric to the generation company, the transfer will be subject to the statutory restriction cited above. If the improvements involve the transfer of property other than real property, then another provision in the holding company law, s. 196.795 (5) (s), would have to be amended for the transfer to be made at book value.

2. *PSC authority to revise affiliated interest contracts.* The petition states that the lease between Wisconsin Electric and the generation company will be an affiliated-interest transaction subject to s. 196.52, Stats. [Petition, op. cit., III H., par. 1, pages 16 and 17.] The petition also states that "the lease will establish fixed-cost recovery for the new plants as approved up front by the PSCW in a manner in which investors can rely, thus improving the ability to attract capital on reasonable terms." [Petition, op. cit., III B., par. 2, page 9.] If the phrase "as approved up front by the PSCW" implies that the petition seeks to have the PSC approve the financial terms of the lease prior to Wisconsin Electric and the generation company entering into the lease and not subsequently change any of its approval conditions, then this type of approval would require a change in the following provision in the affiliated interest law:

... Commission [PSC] approval of a contract or arrangement under this section [the affiliated interest section, s. 196.52, Stats.] shall not preclude disallowance or disapproval of a payment under the contract or arrangement if upon actual experience under the contract or arrangement it appears that the payments provided for or made were or are unreasonable. Every order of the commission approving a contract or arrangement shall be expressly conditioned upon the reserved power of the commission to revise and amend the terms and conditions of the contract or arrangement to protect and promote the public interest. [s. 196.52 (5) (a), Stats.]

If you have any additional questions on the petition addressed in this memorandum, please feel free to direct them to me at the Legislative Council Staff offices.

JES:wu:jal:kam



State of Wisconsin
2001 - 2002 LEGISLATURE

LRB-3119/1

MDK: King

D-NOTE

2001 BILL

TUES.
4/24

Gen. Cat.

- 1 AN ACT *✓* *✓* relating to: leased generation contracts between public utilities and
2 affiliated interests.

Analysis by the Legislative Reference Bureau

Under current law, with certain exceptions, a public utility may not enter into a contract with an affiliated interest without the approval of the public service commission (PSC). An "affiliated interest" is defined to include any of the following: ^{AA}
1) any person owning or holding 5% or more of the voting securities of a public utility;
2) any person in any chain of successive ownership of 5% or more of the voting securities of a public utility; 3) any corporation 5% or more of whose voting securities is owned by any of the foregoing persons; or 4) any person that the PSC determines actually exercises substantial influence over a public utility. The PSC must approve a contract between a public utility and ^{an} affiliated interest if the PSC finds the contract to be reasonable and consistent with the public interest. The PSC is also allowed to exclude from the accounts of a public utility any payment or compensation to or from an affiliated interest under a contract unless the public utility establishes that the payment or compensation is reasonable.

This bill imposes additional requirements on the PSC's approval of a "leased generation contract" between a public utility and an affiliated interest. The bill defines "leased generation contract" as a contract under which a public utility transfers land or buildings to an affiliated interest for the affiliated interest to construct electric generating facilities on the land or in the buildings. In addition, under a leased generation contract, the affiliated interest leases all the electric generating facilities that are constructed to the public utility for operation by the public utility.

BILL

Under the bill, the PSC may not approve a leased generation contract between a public utility and an affiliated interest unless three requirements are satisfied. First, the PSC may not approve a leased generation contract if the PSC has issued, before January 1, 2001, a certificate of public convenience and necessity (CPCN) for any electric generating facility that is constructed under the contract. (Under current law, with certain exceptions, a person may not construct an electric generating facility unless the PSC issues a CPCN.) Second, the public utility may not transfer any existing electric generating facilities to the affiliated interest under the leased generation contract. Third, PSC approval of a leased generation contract depends on the length of the lease. For a gas-fired electric generating facility that is constructed, the lease must be for 20 years or more. For a coal-fired electric generating facility, the lease must be for 25 years or more.

Also under the bill, if the PSC approves a leased generation contract between a public utility and ^{an} affiliated interest, the PSC may not increase or decrease the retail revenue requirements of the public utility on the basis of any dividend, distribution, or charge received by the public utility, or by any other company in a holding company system in which the public utility is an affiliate, as a result of entering into the leased generation contract. In addition, the PSC may not increase or decrease the retail revenue requirements of the public utility on the basis of any gain, profit, or loss arising from the affiliated interest's ownership of electric generating facilities. Also, the PSC must allow the public utility to recover fully in its retail rates any payments under any lease approved by the PSC and all other costs prudently incurred in the public utility's operation and maintenance of the electric generating facilities.

Finally, under current law, certain requirements apply to the relationship between a public utility in a holding company system and any nonutility company that is in the same holding company system. Under one of these requirements, with certain exceptions, a public utility may transfer real property to such a nonutility company only by public sale or by offering the real property to the highest qualified bidder. This bill creates another exception to this requirement. Under the bill, a public utility may enter into a leased generation ~~agreement~~ ^{contract} with such a nonutility company, but only if the leased generation ~~agreement~~ ^{contract} is approved by the PSC as provided in the bill.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

✓
1 **SECTION 1.** 196.52 (9) of the statutes is created to read:

2 196.52 (9) (a) In this subsection, "leased generation contract" means a contract
3 or arrangement under which a public utility transfers land or buildings to an

BILL

1 affiliated interest for the affiliated interest to construct electric generating facilities
2 on the land or in the buildings and to lease all such facilities to the public utility for
3 operation by the public utility.

4 (b) Notwithstanding any other provision of this section:

5 1. The commission may approve a leased generation contract under sub. (3) ✓
6 only if all of the following apply:

7 a. The commission has not issued a certificate of public convenience and
8 necessity under s. 196.491 (3) ✓ before January 1, 2001, for any electric generating
9 facility that is constructed under the leased generation contract.

10 b. No existing electric generating facilities are transferred to the affiliated
11 interest.

12 c. For any gas-fired electric generating facility that is constructed under the
13 leased generation contract, the term of the lease is 20 years or more.

14 d. For any coal-fired electric generating facility that is constructed under the
15 leased generation contract, the term of the lease is 25 years or more.

16 2. The commission may not do any of the following:

17 a. Increase or decrease the retail revenue requirements of a public utility on
18 the basis of any dividend, distribution, or charge received by the public utility, or by
19 a company, as defined in s. 196.795 (1) (f), in a holding company system, as defined
20 in s. 196.795 (1) (i), ✓ in which the public utility is a public utility affiliate, as defined
21 in s. 196.795 (1) (L), ✓ as a result of the public utility entering into a leased generation
22 contract.

23 b. Increase or decrease the retail revenue requirements of a public utility on
24 the basis of any gain, profit, or loss arising from the ownership of electric generating

BILL**SECTION 1**

1 facilities by an affiliated interest under a leased generation contract between the
2 public utility and the affiliated interest.

3 3. The commission shall allow a public utility that has entered into a leased
4 generation contract to recover fully in its retail rates any payments under any lease
5 that has been approved by the commission under sub. (3)✓ and all other costs
6 prudently incurred in the public utility's operation and maintenance of the electric
7 generating facilities constructed under the leased generation contract.

8 **SECTION 2.** 196.795 (5) (k) 1. of the statutes is amended to read:

9 196.795 (5) (k) 1. Except as provided under subd. 2. or 3.✓, no public utility
10 affiliate may transfer, sell, or lease to any nonutility affiliate with which it is in a
11 holding company system any real property which, on or after November 28, 1985, is
12 held or used for provision of utility service except by public sale or offering to the
13 highest qualified bidder.

14 History: 1985 a. 79; 1985 a. 297 ss. 67, 68, 76; 1985 a. 332; 1987 a. 186; 1987 a. 403 s. 256; 1989 a. 303; 1991 a. 269; 1993 a. 213; 1997 a. 140, 204; 1999 a. 9, 150.

14 **SECTION 3.** 196.795 (5) (k) 3. of the statutes is created to read:

15 196.795 (5) (k) 3. If approved by the commission under s. 196.52 (9) (b) 1.✓, a
16 public utility affiliate may enter into a leased generation contract, as defined in s.
17 196.52 (9) (a)✓, with a nonutility affiliate.

18 **SECTION 4. Initial applicability.**

19 (1) The treatment of section 196.52 (9)✓ and 196.795 (5) (k) 1.✓ and 3.✓ of the
20 statutes first applies to leased generation contracts that are entered into, modified,
21 renewed, or extended on the effective date of this subsection.

22 (END)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3119/1dn

MDK: *King*

Senator Moen:

Please review this bill, which is based on instructions from Lee Cullen, very carefully to make sure that it achieves your intent. In particular, please note the following:

1. I structured the bill so that the main requirements are set forth in s. 196.52, stats., rather than in s. 196.795, stats. As a result, because s. 196.52 applies to the PSC's approval of a contract, I decided to define "leased generation contract" rather than use the term defined in the instructions (i.e., "new leased generation facility"). Also, I am hesitant to refer to something as "new" in the statutes. If the bill passes, the facilities will no longer be ^{new} a couple of sessions from now. ✓

2. I think that the last phrase (beginning with "as a result of...") in proposed s. 196.52 (9) (b) 2. a. should be revised. I don't think that "as a result of" clearly states the logical connection between the dividends, etc., that may be received and the fact that a public utility has entered into a leased generation contract. Is there more specific language that can be used, other than "as a result of"? ✓

3. As John Stolzenberg has pointed out, if property other than real property is transferred to a nonutility affiliate in a holding company system, then s. 196.795 (5) (s), stats., may have to be amended. ✓

Mark D. Kunkel
Legislative Attorney
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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3119/1dn
MDK:kmg:pg

April 24, 2001

Senator Moen:

Please review this bill, which is based on instructions from Lee Cullen, very carefully to make sure that it achieves your intent. In particular, please note the following:

1. I structured the bill so that the main requirements are set forth in s. 196.52, stats., rather than in s. 196.795, stats. As a result, because s. 196.52 applies to the PSC's approval of a contract, I decided to define "leased generation contract," rather than use the term defined in the instructions (i.e., "new leased generation facility"). Also, I am hesitant to refer to something as "new" in the statutes. If the bill passes, the facilities will no longer be "new" a couple of sessions from now.
2. I think that the last phrase (beginning with "as a result of...") in proposed s. 196.52 (9) (b) 2. a. should be revised. I don't think that "as a result of" clearly states the logical connection between the dividends, etc., that may be received and the fact that a public utility has entered into a leased generation contract. Is there more specific language that can be used, other than "as a result of"?
3. As John Stolzenberg has pointed out, if property other than real property is transferred to a nonutility affiliate in a holding company system, then s. 196.795 (5) (s), stats., may have to be amended.

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April 27, 2001

BY HAND

Confidential

Mr. Bruce Humphrey
Office of Senator Rod Moen
Room 8 South - State Capitol
Madison, WI 53707

Dear Bruce,

Enclosed are suggested changes to LRB 3119/1.

Sincerely,

CULLEN WESTON PINES & BACH LLP



Lee Cullen

LC/st

cc: Mark Kunkel, LRB

Enclosure

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Steven A. Bach
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Elise Clancy Ruoho
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Of Counsel:
Cheryl Rosen Weston

Changes to LRB 3119/1

1. p. 3, l. 2. Change "land or buildings" to "land, buildings, or fixtures." In l. 4 delete "all" ~~X~~

2. p. 3, after l. 5. Add a new (b): "Nothing in this subsection shall preclude a cooperative association organized under chapter 185, a municipal utility, or a municipal electric company organized under sec. 66.0825 from acquiring an interest in land, buildings, or fixtures which are also subject to a leased generation contract." ~~X~~ - deleted also - added definitions

3. p. 3, l. 12. Delete "existing" and after "electric generating facilities" add "that are providing electric capacity or energy as of the effective date of this Act" ~~X~~ See ariff. change discussed with Lee Cullen

4. p. 3, l. 18. Add "Except as provided in subsection 3," to the introduction ~~X~~

5. p. 3, l. 23-24. Delete "as a result of the public utility entering into a leased generation contract" and add "arising from the ownership of electric generating facilities by an affiliated interest under a leased generation contract between the public utility and the affiliated interest." ~~X~~

6. p. 3, after l. 17. Add the following sentences: "The effective date of any such approval shall be the date on which the affiliated interest commences construction of the electric generating facilities as provided in the leased generation contract. The commission shall maintain jurisdiction to insure that such facilities are placed in operation as provided in the leased generation contract." ~~X~~

10:30 am
MONDAY

D-NOTE

2001 BILL

MONDAY
4/30
10:00am

2

RM NOT
RUN

Gen. Cat.

- 1 AN ACT *to amend* 196.795 (5) (k) 1.; and *to create* 196.52 (9) and 196.795 (5) (k)
- 2 3. of the statutes; **relating to:** leased generation contracts between public
- 3 utilities and affiliated interests.

Analysis by the Legislative Reference Bureau

Under current law, with certain exceptions, a public utility may not enter into a contract with an affiliated interest without the approval of the public service commission (PSC). An "affiliated interest" is defined to include any of the following: 1) any person owning or holding 5% or more of the voting securities of a public utility; 2) any person in any chain of successive ownership of 5% or more of the voting securities of a public utility; 3) any corporation 5% or more of whose voting securities is owned by any of the foregoing persons; or 4) any person that the PSC determines actually exercises substantial influence over a public utility. The PSC must approve a contract between a public utility and an affiliated interest if the PSC finds the contract to be reasonable and consistent with the public interest. The PSC is also allowed to exclude from the accounts of a public utility any payment or compensation to or from an affiliated interest under a contract unless the public utility establishes that the payment or compensation is reasonable.

This bill imposes additional requirements on the PSC's approval of a "leased generation contract" between a public utility and an affiliated interest. The bill defines "leased generation contract" as a contract under which a public utility transfers land ~~for~~ buildings to an affiliated interest for the affiliated interest to construct electric generating facilities on the land ~~and~~ in the buildings. In addition,

for fixtures

or in

for fixtures

BILL

under a leased generation contract, the affiliated interest leases ~~the~~ the electric generating facilities that are constructed to the public utility for operation by the public utility.

Under the bill, the PSC may not approve a leased generation contract between a public utility and an affiliated interest unless three requirements are satisfied. First, the PSC may not approve a leased generation contract if the PSC has issued, before January 1, 2001, a certificate of public convenience and necessity (CPCN) for any electric generating facility that is constructed under the contract. (Under current law, with certain exceptions, a person may not construct an electric generating facility unless the PSC issues a CPCN.) Second, ~~the public utility may not transfer any existing electric generating facilities to the affiliated interest under the leased generation contract.~~ Third, PSC approval of a leased generation contract depends on the length of the lease. For a gas-fired electric generating facility that is constructed, the lease must be for 20 years or more. For a coal-fired electric generating facility, the lease must be for 25 years or more. INSERT 2B

Also under the bill, if the PSC approves a leased generation contract between a public utility and an affiliated interest, the PSC may not increase or decrease the retail revenue requirements of the public utility on the basis of any dividend, distribution, or charge received by the public utility, or by any other company in a holding company system in which the public utility is an affiliate, ~~as a result of entering into the leased generation contract.~~ In addition, the PSC may not increase or decrease the retail revenue requirements of the public utility on the basis of any gain, profit, or loss arising from the affiliated interest's ownership of electric generating facilities. Also, the PSC must allow the public utility to recover fully in its retail rates any payments under any lease approved by the PSC and all other costs prudently incurred in the public utility's operation and maintenance of the electric generating facilities.

Finally, under current law, certain requirements apply to the relationship between a public utility in a holding company system and any nonutility company that is in the same holding company system. Under one of these requirements, with certain exceptions, a public utility may transfer real property to such a nonutility company only by public sale or by offering the real property to the highest qualified bidder. This bill creates another exception to this requirement. Under the bill, a public utility may enter into a leased generation contract with such a nonutility company, but only if the leased generation contract is approved by the PSC as provided in the bill.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 196.52 (9) of the statutes is created to read:

BILL

or fixtures

1 196.52 (9) (a) In this subsection, "leased generation contract" means a contract
2 or arrangement under which a public utility transfers land ~~and~~ buildings to an
3 affiliated interest for the affiliated interest to construct electric generating facilities
4 or in on the land ~~or in~~ the buildings or fixtures and to lease ~~the~~ such facilities to the public utility for
5 operation by the public utility.

6 (b) Notwithstanding any other provision of this section:

7 1. The commission may approve a leased generation contract under sub. (3)
8 only if all of the following apply:

9 a. The commission has not issued a certificate of public convenience and
10 necessity under s. 196.491 (3) before January 1, 2001, for any electric generating
11 facility that is constructed under the leased generation contract.

12 b. ~~No existing electric generating facilities are transferred to the affiliated~~
13 ~~interest.~~ INSERT 3-12

14 c. For any gas-fired electric generating facility that is constructed under the
15 leased generation contract, the term of the lease is 20 years or more.

16 d. For any coal-fired electric generating facility that is constructed under the
17 leased generation contract, the term of the lease is 25 years or more.

18 2. The commission may not do any of the following:

Except as provided in
subd. 3.

19 a. Increase or decrease the retail revenue requirements of a public utility on
20 the basis of any dividend, distribution, or charge that is received by the public utility, or by
21 a company, as defined in s. 196.795 (1) (f), in a holding company system, as defined
22 in s. 196.795 (1) (i), in which the public utility is a public utility affiliate, as defined
23 in s. 196.795 (1) (L), ~~as a result of the public utility entering into a leased generation~~

24 ~~contract.~~

INSERT 3-24

BILL

INSERT 4-9

b. Increase or decrease the retail revenue requirements of a public utility on the basis of any gain, profit, or loss arising from the ownership of electric generating facilities by an affiliated interest under a leased generation contract between the public utility and the affiliated interest.

3. The commission shall allow a public utility that has entered into a leased generation contract to recover fully in its retail rates any payments under any lease that has been approved by the commission under sub. (3) and all other costs prudently incurred in the public utility's operation and maintenance of the electric generating facilities constructed under the leased generation contract.

SECTION 2. 196.795 (5) (k) 1. of the statutes is amended to read:

196.795 (5) (k) 1. Except as provided under subd. 2. or 3., no public utility affiliate may transfer, sell, or lease to any nonutility affiliate with which it is in a holding company system any real property which, on or after November 28, 1985, is held or used for provision of utility service except by public sale or offering to the highest qualified bidder.

SECTION 3. 196.795 (5) (k) 3. of the statutes is created to read:

196.795 (5) (k) 3. If approved by the commission under s. 196.52 (9) (b) 1., a public utility affiliate may enter into a leased generation contract, as defined in s. 196.52 (9) (a), with a nonutility affiliate.

SECTION 4. Initial applicability.

(1) The treatment of sections 196.52 (9) and 196.795 (5) (k) 1. and 3. of the statutes first applies to leased generation contracts that are entered into, modified, renewed, or extended on the effective date of this subsection.

(END)

**2001-2002 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3119/2ins
MDK:.....

INSERT 2A: ✓

construction of the electric generating facilities that are subject to the contract must commence on or after January 1, 2001.

INSERT 2B: ✓

The bill also provides that the effective date of the PSC's approval of a leased generation contract is the date on which the affiliated interest commences construction of the electric generating facilities as provided in the contract. In addition, the bill provides that the PSC maintains jurisdiction to ensure that the electric generating facilities are placed in operation as provided in the contract.

INSERT 2C: ✓

and that arises from the ownership of electric generating facilities by an affiliated interest under the contract

INSERT 2D: ✓

In addition, the bill provides that none of the provisions described above prohibit any of the following from acquiring an interest in land, buildings, or fixtures that are subject to a leased generation contract: 1) a cooperative association; 2) a municipal utility; or 3) a municipal electric company.

INSERT 3-12: ✓

Construction of the electric generating facilities that are subject to the leased generation contract commences on or after January 1, 2001.

INSERT 3-24:

1 and that arises from the ownership of electric generating facilities by an affiliated
2 interest under a leased generation contract between the public utility and the
3 affiliated interest

4 **INSERT 4-9:**

5 (c) The effective date of an approval under par. (b) 1. shall be the date on which
6 the affiliated interest commences construction of the electric generating facilities as
7 provided in the leased generation contract. The commission shall maintain
8 jurisdiction to ensure that such electric generating facilities are placed in operation
9 as provided in the leased generation contract.

10 (d) Nothing in this subsection prohibits a cooperative association organized
11 under ch. 185, a municipal utility, as defined in s. 196.377 (2) (a) 3., or a municipal
12 electric company, as defined in s. 66.0825 (3) (d), from acquiring an ~~an~~ interest in land,
13 buildings, or fixtures that are subject to a leased generation contract.

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3119/2dn

MDK:.....

kmg

Senator Moen:

This version is based on instructions received from Lee Cullen on April 27. Please note the following:

1. Item 2 of the instructions refer^s to "land, building, or fixtures which are *also* subject to a leased generation contract". I don't think the "also" serves any function, so I didn't use it in proposed s. 196.52 (9) (d). ✓
2. I made some slight changes to the placement of the new provisions that are included in the instructions.

Mark D. Kunkel
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**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3119/2dn
MDK:kmg:km

April 30, 2001

Senator Moen:

This version is based on instructions received from Lee Cullen on April 27. Please note the following:

1. Item 2 of the instructions refers to "land, building, or fixtures which are *also* subject to a leased generation contract." I don't think the "also" serves any function, so I didn't use it in proposed s. 196.52 (9) (d).
2. I made some slight changes to the placement of the new provisions that are included in the instructions.

Mark D. Kunkel
Legislative Attorney
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D-NOTE

2001 BILL

by 2:00pm
TODAYRM NOT
RUN

Gen. Cat.

- 1 AN ACT *to amend* 196.795 (5) (k) 1.; and *to create* 196.52 (9) and 196.795 (5) (k)
- 2 3. of the statutes; **relating to:** leased generation contracts between public
- 3 utilities and affiliated interests.

Analysis by the Legislative Reference Bureau

Under current law, with certain exceptions, a public utility may not enter into a contract with an affiliated interest without the approval of the public service commission (PSC). An "affiliated interest" is defined to include any of the following: 1) any person owning or holding 5% or more of the voting securities of a public utility; 2) any person in any chain of successive ownership of 5% or more of the voting securities of a public utility; 3) any corporation 5% or more of whose voting securities is owned by any of the foregoing persons; or 4) any person that the PSC determines actually exercises substantial influence over a public utility. The PSC must approve a contract between a public utility and an affiliated interest if the PSC finds the contract to be reasonable and consistent with the public interest. The PSC is also allowed to exclude from the accounts of a public utility any payment or compensation to or from an affiliated interest under a contract unless the public utility establishes that the payment or compensation is reasonable.

This bill imposes additional requirements on the PSC's approval of a "leased generation contract" between a public utility and an affiliated interest. The bill defines "leased generation contract" as a contract under which a public utility transfers land, buildings, or fixtures to an affiliated interest for the affiliated interest to construct electric generating facilities on or in the land, buildings, or fixtures. In

BILL

addition, under a leased generation contract, the affiliated interest leases the electric generating facilities that are constructed to the public utility for operation by the public utility.

Under the bill, the PSC may not approve a leased generation contract between a public utility and an affiliated interest unless ~~three~~^{four} requirements are satisfied. First, the PSC may not approve a leased generation contract if the PSC has issued, before January 1, 2001, a certificate of public convenience and necessity (CPCN) for any electric generating facility that is constructed under the contract. (Under current law, with certain exceptions, a person may not construct an electric generating facility unless the PSC issues a CPCN.) Second, construction of the electric generating facilities that are subject to the contract must commence on or after January 1, 2001. ~~Third~~, PSC approval of a leased generation contract depends on the length of the lease. For a gas-fired electric generating facility that is constructed, the lease must be for 20 years or more. For a coal-fired electric generating facility, the lease must be for 25 years or more.

The bill also provides that the effective date of the PSC's approval of a leased generation contract is the date on which the affiliated interest commences construction of the electric generating facilities as provided in the contract. In addition, the bill provides that the PSC maintains jurisdiction to ensure that the electric generating facilities are placed in operation as provided in the contract.

Also under the bill, if the PSC approves a leased generation contract between a public utility and an affiliated interest, the PSC may not increase or decrease the retail revenue requirements of the public utility on the basis of any dividend, distribution, or charge that is received by the public utility, or by any other company in a holding company system in which the public utility is an affiliate, and that arises from the ownership of electric generating facilities by an affiliated interest under the contract. In addition, the PSC may not increase or decrease the retail revenue requirements of the public utility on the basis of any gain, profit, or loss arising from the affiliated interest's ownership of electric generating facilities. Also, the PSC must allow the public utility to recover fully in its retail rates any payments under any lease approved by the PSC and all other costs prudently incurred in the public utility's operation and maintenance of the electric generating facilities.

In addition, the bill provides that none of the provisions described above prohibit any of the following from acquiring an interest in land, buildings, or fixtures that are subject to a leased generation contract: 1) a cooperative association; 2) a municipal utility; or 3) a municipal electric company.

Finally, under current law, certain requirements apply to the relationship between a public utility in a holding company system and any nonutility company that is in the same holding company system. Under one of these requirements, with certain exceptions, a public utility may transfer real property to such a nonutility company only by public sale or by offering the real property to the highest qualified bidder. This bill creates another exception to this requirement. Under the bill, a public utility may enter into a leased generation contract with such a nonutility company, but only if the leased generation contract is approved by the PSC as provided in the bill.

→ Third, no existing electric generating facility ^{that is} in service on January 1, 2001, is transferred to the affiliated interest. Fourth,

BILL

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 196.52 (9) of the statutes is created to read:

196.52 (9) (a) In this subsection, "leased generation contract" means a contract or arrangement under which a public utility transfers land, buildings, or fixtures to an affiliated interest for the affiliated interest to construct electric generating facilities on or in the land, buildings, or fixtures, and to lease such facilities to the public utility for operation by the public utility.

(b) Notwithstanding any other provision of this section:

1. The commission may approve a leased generation contract under sub. (3) only if all of the following apply:

a. The commission has not issued a certificate of public convenience and necessity under s. 196.491 (3) before January 1, 2001, for any electric generating facility that is constructed under the leased generation contract.

b. Construction of the electric generating facilities that are subject to the leased generation contract commences on or after January 1, 2001.

^d c. For any gas-fired electric generating facility that is constructed under the leased generation contract, the term of the lease is 20 years or more.

^{ge} d. For any coal-fired electric generating facility that is constructed under the leased generation contract, the term of the lease is 25 years or more.

2. Except as provided in subd. 3., the commission may not do any of the following:

^{that is} ^{red} c. No existing electric generating facility in service on January 1, 2001, is transferred to the affiliated interest.

BILL**SECTION 1**

1 a. Increase or decrease the retail revenue requirements of a public utility on
2 the basis of any dividend, distribution, or charge that is received by the public utility,
3 or by a company, as defined in s. 196.795 (1) (f), in a holding company system, as
4 defined in s. 196.795 (1) (i), in which the public utility is a public utility affiliate, as
5 defined in s. 196.795 (1) (L), and that arises from the ownership of electric generating
6 facilities by an affiliated interest under a leased generation contract between the
7 public utility and the affiliated interest.

8 b. Increase or decrease the retail revenue requirements of a public utility on
9 the basis of any gain, profit, or loss arising from the ownership of electric generating
10 facilities by an affiliated interest under a leased generation contract between the
11 public utility and the affiliated interest.

12 3. The commission shall allow a public utility that has entered into a leased
13 generation contract to recover fully in its retail rates any payments under any lease
14 that has been approved by the commission under sub. (3) and all other costs
15 prudently incurred in the public utility's operation and maintenance of the electric
16 generating facilities constructed under the leased generation contract.

17 (c) The effective date of an approval under par. (b) 1. shall be the date on which
18 the affiliated interest commences construction of the electric generating facilities as
19 provided in the leased generation contract. The commission shall maintain
20 jurisdiction to ensure that such electric generating facilities are placed in operation
21 as provided in the leased generation contract.

22 (d) Nothing in this subsection prohibits a cooperative association organized
23 under ch. 185, a municipal utility, as defined in s. 196.377 (2) (a) 3., or a municipal
24 electric company, as defined in s. 66.0825 (3) (d), from acquiring an interest in land,
25 buildings, or fixtures that are subject to a leased generation contract.

BILL

SECTION 2. 196.795 (5) (k) 1. of the statutes is amended to read:

196.795 (5) (k) 1. Except as provided under subd. 2. or 3., no public utility affiliate may transfer, sell, or lease to any nonutility affiliate with which it is in a holding company system any real property which, on or after November 28, 1985, is held or used for provision of utility service except by public sale or offering to the highest qualified bidder.

SECTION 3. 196.795 (5) (k) 3. of the statutes is created to read:

196.795 (5) (k) 3. If approved by the commission under s. 196.52 (9) (b) 1., a public utility affiliate may enter into a leased generation contract, as defined in s. 196.52 (9) (a), with a nonutility affiliate.

SECTION 4. Initial applicability.

(1) The treatment of sections 196.52 (9) and 196.795 (5) (k) 1. and 3. of the statutes first applies to leased generation contracts that are entered into, modified, renewed, or extended on the effective date of this subsection.

(END)

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3119/3dn

MDK: 

Senator Moen:

This version is identical to the previous version, except for new proposed s. 196.52 (9) (b) 1. c. and the renumbering of the rest of that subdivision.

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**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3119/3dn
MDK:kmg:pg

April 30, 2001

Senator Moen:

This version is identical to the previous version, except for new proposed s. 196.52 (9) (b) 1. c. and the renumbering of the rest of that subdivision.

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